Editorial

As we present the third and prepare the fourth volume of *Kritika*, the different lines of thought that preoccupy our authors become more distinct. Rarely do they only advocate substituting radical alternatives for the system of intellectual property protection as we know it or to major parts of it. Rather, they seek new ways of orientation within an ever expanding and increasingly heterogeneous system of protection and they seek a reorientation towards socially legitimate and democratically legitimized goals whose prospects of attainment are real. This search for orientation and reorientation begins with the recognition of the insufficiency and inconsistency of the pieces of knowledge we have about the economic operation of the various categories of property rights, and with increasing doubts about the adequacy and workability of the concept of property as a guiding principle of protection. Its underlying ideas – exclusivity, individual autonomy, transferability and securitization in and via markets – while at the root of the expansion of intellectual property, have not allowed the contours of protection to be kept under control. In addition, these concepts and ideas have resulted in a systemic mismatch when transposed without sufficiently smooth adaptation to divergent socio-economic environments, or even in conflicts and rejection when extended to subject matter in which non-market values play a strong role. Moreover, as noted in our editorial for Volume 2 of *Kritika*, continuously extending protection along and even beyond the lines of traditional or new categories of intellectual property rights has led to fragmentation of and frictions within the overall system that, due precisely to the expansionist forces that drive it, in practice cannot be sufficiently mitigated by a purpose-bound or functionalist construction and limitation of the right to exclusive exploitation, however desirable that is. Therefore, while the determination of ways of containing the scope and the forms of protection within the limits of the exploitation function is the recurrent theme of critical analysis, another is an increased reliance on controlling excesses of protection by strictly applying the rules of the framework regulation of markets. Historically speaking, the rules of competition have been crucial, but increasingly other frameworks of regulation, such as those in the health sector, are coming into play.

Underneath or concomitantly with the potential for property principles for a continuous, substantive and territorial expansion of protection run currents of techno-economic and social change that directly affect, albeit to varying degrees, the assumptions explicitly or implicitly underlying the legal concepts of intellectual property. These changes relate inter alia to the now long-running transformation of the processes of invention and creation from individually undertaken ones to their systematization by (often global) firms, as well as strongly emerging transformations that move from discrete agency to the agency of networks and collective efforts (such as ‘open innovation’) and to participation, if not generation by users. The exclusive right and its contractual exploitation have always been central to an understanding of capitalism’s constantly changing patterns of expansion. In the context of intellectual property the exclusive right, originally intended to enable the owner to prevent and suppress imitation by others, has come to have other functions, including allowing intellectual goods to be part of market bargaining games, securitization processes, asset valuations, tradability and the maintenance of global supply chains. Trade agreements drafted to adjust the regulatory systems of states have become primary vehicles for the globalization of intellectual property rights, the content of these agreements being heavily influenced by transnational private networks of firms, professionals and organizations. This system expansion based on the exclusive right in intangibles is producing patterns of resistance and defiance, the consequences of which are, at best, imperfectly understood by policy makers. The social welfare effects of these trade agreements on consumers, workers and the provisioning of public goods have come in for scrutiny and public debate. The exclusivity sought by some firms in intangibles has become subject to ever more frequent and broad claims to access for follow-on and complementary or peripheral innovation, as well as to practices of shared use, such as in the context of standardization or the exploitation of (digitalized) data. More recently, exploitation of intellectual property by way of embodiments of their subject matter or by way of physical representation has increasingly been complemented and – to a greater or lesser extent – even been substituted by various modes of non-physical exploitation, such as licensing and electronic reproduction or distribution; in the field of copyright it has also changed more and more from individual to collective and to interactive forms of utilizing works. Concomitantly, the modes of infringement and their control have been extended, in particular as regards the dissemination of works or the use of trademarks by and on the new Internet media.

The result of such changes is or seems to be that the limits and limitations of the protection of intellectual property may no longer be

derived from or developed within the system alone as a matter of merely implementing the conditions that inherently determine the efficient functioning of the system. The actual and potential commodifying expressions of the system have gone too far for such an internal exercise to be effective. Rather, a need has arisen to rely directly on various ‘countervailing’ fundamental rights, or on laws implementing particular rights, such as competition law or the laws on privacy. In addition, the system of intellectual property protection has come under pressure from all kinds of industrial and innovation policies on the one hand, and, on the other, from a broad range of regulatory challenges resulting from concerns about climate change, public health, supply of food, etc. Thus, the overall impression is that of a paradigm shift taking place that is all the more troubling as, from the beginning, the fundamentals of intellectual property protection have been set on the moving sands of technological and socio-economic change.

The authors of the present volume of *Kritika* do tackle problematic aspects of the existing paradigm, as when Fiona Macmillan asks us to resist ‘copyright’s romance’ by more rigorously adhering to a strict divide between individualistic copyright and collective cultural rights, or when Mohammed El Said invites the reader to rethink the foundations of intellectual property and its contemporary challenges in the light of Islamic principles. A new technological challenge, digitization, is addressed by Bernt Hugenholtz, who, from an intellectual property perspective, denies the legitimacy of introducing a new category of ‘property in’ or ‘ownership of’ data. Thomas Hoeren, in turn, referencing the pressure of digitization, questions whether the already existing and growing hypertrophy of copyright could ever be brought into reasonable contours without first establishing a broader and firmer framework for an overarching theory of ‘just information law’ that draws on socially embedded ‘pre-notional’ understandings of information. The fundamental problem underlying both contributions and their divergent approaches is, indeed, whether in the future a paradigm of well-circumscribed intellectual property protection will develop from within the existing system or only once a new and general theory of rights and duty-based intellectual goods of all kinds has come to be broadly recognized. As any such development will necessarily take place within or at least with the participation of the institutions of intellectual property protection, their roles and activities need to be given more attention than has been the case in the past. We think this is rendered more true by developments such as, for instance, intellectual property offices necessarily pursuing their own bureaucratic interests and participating in international coalitions, the creation of ever more specialized intellectual property

jurisdictions throughout the world, thus increasing the risk of an epistemic channelling of the judicial evolution of intellectual property protection, and international organizations influencing in many ways the global development of intellectual property protection. In this volume, some of these issues are taken up, first, by Shamnad Basheer and Rahul Bajaj's inquiry into the adjudicative rather than administrative role of the Indian Patent Office, and their plea for improving the adjudicative independence of the patent office by structural reforms. As regards law making on the international level, Sara Bannerman's critical analysis of the subtle but sustained influence the World Intellectual Property Organization exercises as a central node within the networked governance of global intellectual property leads her to advocate for 'Remodelling global intellectual property' so as to ensure its broader and more differentiated responsiveness to the needs and interests of all those who are actually affected by it. Blayne Haggart then concludes Volume 3. Drawing on theories of international political economy he examines the interactions between global firms and the state, and shows that due to both their complementary interests in ever more information/surveillance and the propertization of knowledge, that is to say more intellectual property protection, states and global capital are producing an 'info-imperium'.

This editorial cannot conclude without words of 'Farewell' and 'Welcome'. Linda Briceño Moraia, our Editorial Assistant for Volumes 1 and 2, has taken up new professional duties whose workload is too heavy to allow her to continue to participate in the editing of *Kritika*. Her help has been invaluable; we owe her so many words of thanks and wholeheartedly wish her all the well-deserved success in the work she has begun with so much energy.

Our new team member, Francesco Banterle, who has graduated from the Faculty of Law of the University of Milan and also holds a PhD from this Faculty, has immediately brought his excellent editorial skills to bear on this volume. We welcome him again with many thanks and very much look forward to his continuing collaboration.

Hanns Ullrich, Peter Drahos and Gustavo Ghidini